IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. [redacted] 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THOMAS F. MOORE, JR.,
10 Columbus Circle,
New York 19, New York,
Attorney for Petitioner.

SAMUEL I. ROSENMAN,
FREDERIC P. LEE,
JOHN R. DAVISON,
SCOTT LILLY,
of Counsel.

June 19, 1959.

IN THE

Supreme Court of the United States

October Term 1958

No. 921

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,
v.
TUSCARORA INDIAN NATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

As pointed out in the memorandum submitted by the Solicitor General in reply to the brief filed by respondent in opposition both to this petition and to the petition in No. 911, respondent is wrong in contending that the controversy is moot. It is not moot because, pursuant to an order of the United States District Court for the Western District of New York, based on the holding of the Second Circuit Court of Appeals in *Tuscarora Nation* v. *Power Authority*, 257 F. (2d) 885 (1958), cert. denied 358 U. S. 841, the Power Authority has taken possession of 85.6 acres of the reservation and has built transmission lines which are already in use. These lines are not referred to in respondent's brief,

although our petition (page 9) pointed out the legal dilemma with respect to them which we now ask this Court to resolve.

The case is not moot for a further reason—if no Indian land is available as a matter of law for the storage reservoir, the capacity of the project will be substantially reduced.

We desire to supplement the Solicitor General's memorandum by calling the Court's attention to the following facts.

1. In an effort to give the impression that no Indians ever testified before Committees of Congress in the hearings leading up to the passage of Public Law 85-159 (Act of August 21, 1957; 16 U. S. C. §§ 836, 836a; 71 Stat. 401) authorizing the Niagara Project, respondent in a footnote on page 18 of its brief quotes a Harvard Law Review article which states that the Indians did not appear to have testified at the hearings and that in the plan considered by Congress there was no apparent necessity for the taking of Indian land. (Note, Harv. L. Rev. 1372, 1373-4 (1959))

The House of Representatives did not hold hearings in 1957, but did issue a report that year (H.R. No. 862, 85th Cong. 1st Sess.) on the basis of which Public Law 85-159 was passed. This report referred to the hearings held by the Committee in the 81st, 82nd, 83rd and 84th Congresses and said:

> "In view of all of the foregoing circumstances, including the 7-year history of the legislation, the extent of the hearings previously held . . . further public hearings were not required in the public interest, and would be productive of only further delay aggravating the existing emergency situation."

A representative of the Seneca Indians testified at the hearings in the 82nd Congress and claimed that the Indians owned land vitally needed for the project and objected to its being taken. A member of the House Committee addressed the witness as follows:

"MR. ANGELL. I gather from what you are saying that you are interested in protecting the rights of the Indians. I did not hear your testimony.

"I come from Portland, Oreg. We have a large number of reservations, Indian lands, and rights under treaties, particularly on the Columbia River. The way it is handled out there, the Government takes any of their property, which it can do, of course under condemnation. It can condemn the property owned by me or the Indians as far as that goes, but it must compensate the person who owns the property. The Indians have recourse against the Government for its value if their property is taken." (Hearings before Subcommittee of House Committee on Public Works, Sept. 19-21, 1951, Pub. Doc. No. 82-8, p. 166)

At the House Public Works Committee hearing in 1956 a witness testified that the Power Authority could condemn whatever land was needed for the project regardless of its ownership. (Hearings before Subcommittee of House Committee on Public Works, June 28, 1956, Pub. Doc. No. 84-22, pp. 23-24)

The Senate Committee on Public Works did hold a hearing in 1957 and no Indian witness appeared at the hearing, although the fact that Tuscarora land was needed for the reservoir had been open and notorious for several months, had been brought to the attention of the Tuscarora, and actual negotiations were being carried on with them. (T. 6404-6, 7938-9)

A Power Authority brochure introduced in evidence at the hearing and examined by each member of the Committee showed the project's proposed storage reservoir in a location which included Tuscarora land, although ownership of none of the land in the project was indicated (T. 7000-2, 7612-3, 7884 *et seq.*).

In a hearing held by the Senate Public Works Committee in the 82nd Congress, a Seneca representative gave the same type of testimony as he gave before the House Com-

mittee. (Hearings before Subcommittee of Senate Committee on Public Works August 21-22, 1951, pp. 182-188.)

2. In footnote 12 on page 23 of its brief, respondent seeks to give the impression that in Section 3(2) of the Federal Power Act the phrase "other lands and interests in lands owned by the United States, and withdrawn, reserved or withheld from private appropriation or disposal under the public land laws" refers only to lands which are withdrawn by virtue of some provision of the public land laws. Actually, the phrase refers to public lands withdrawn, reserved or withheld by statute, by treaty or by executive order and which, no matter how withdrawn, cannot be appropriated or disposed of to private individuals under the procedures set up in the public land laws.

3. Respondent attempts to answer the Power Authority's contention that the judgment of the Second Circuit Court of Appeals in *Tuscarora Nation of Indians* v. *Power Authority, supra*, is binding on Tuscarora—which selected the Second Circuit as it first forum—and should have been honored by the District of Columbia Circuit—in which it elected to file its review petition although it could have filed it in the Second Circuit. It says on page 20 that "the filing of the appeal in the District of Columbia Court gave that tribunal 'exclusive jurisdiction to affirm, modify or set aside' the license". Actually, Section 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b) does not give exclusive jurisdiction to the Court in which a review proceeding is brought until the record is filed with it by the Federal Power Commission, and in this case the record was not filed until after the District Court judgment had been entered in the Second Circuit action. Since the review petition in this case was filed prior to the amendment of Section 313(b) by Public Law 85-791 on August 28, 1958, the District of Columbia Circuit got no jurisdiction, let alone exclusive jurisdiction, prior to the filing of the record.

Respondent contends that the Second Circuit judgment was not binding on it because the Federal Power Commission

was not a party there. But had the Second Circuit judgment been adverse to the Power Authority, the Federal Power Commission would have been effectively bound even though it was not a party because its licensee would have been unable to condemn Tuscarora land and by the terms of Public Law 85-159 the Commission could not issue a license for the Niagara Project to anyone else. In any event, the Second Circuit judgment having been adverse to Tuscarora, it was bound by it in any other litigation involving the same issue regardless of identity of other parties or "mutuality".

Bruszewski v. *United States*, 181 F. 2d 419 (3d. Cir. 1950);
Israel v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956);
Coca Cola v. *Pepsi Cola Co.*, 6 W. W. Harr. (36 Del.) 124, 172 A. 260 (1934).

Conclusion

For the foregoing reasons and for those set forth in the petition herein, as well as the petition and memorandum submitted by the Solicitor General in No. 911, this petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

THOMAS F. MOORE, JR.,
10 Columbus Circle,
New York 19, New York,
Attorney for Petitioner.

SAMUEL I. ROSENMAN,
FREDERIC P. LEE,
JOHN R. DAVISON,
SCOTT LILLY,
Of Counsel.

June 19, 1959.